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No. 00-370

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL MONAHAN, *et al.*,

Petitioners,

-v.-

NEW YORK CITY DEPARTMENT OF CORRECTION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in allowing respondents to amend some of their answers in this consolidated action to include the defense of res judicata?

2. Whether petitioners' action is barred by the doctrine of res judicata?

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Respondents, New York City Department of Correction, *et al.* ("respondents"), respectfully request that this Court deny the petition by petitioners, Daniel Monahan, *et al.* ("petitioners"), for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit, entered June 8, 2000 (1a-36a).

The Second Circuit unanimously affirmed the judgment of the United States District Court for the

Southern District of New York (Rakoff, J.), entered July 14, 1998, which had dismissed with prejudice petitioners' consolidated action challenging the constitutionality of the sick leave policy of respondent the New York City Department of Correction ("DOC") (A9).[1] That judgment followed the District Court's July 7, 1998 opinion and order (one paper) which had granted respondents' motion for summary judgment and had denied petitioners' motion for summary judgment (37a-51a). In affirming, the Second Circuit held that the District Court had not abused its discretion in allowing respondents to amend some of their answers to include the defense of res judicata. The Second Circuit then held that res judicata barred petitioners' facial challenge to the sick leave policy.

This Court should deny review. Petitioners' claim that the District Court abused its discretion in allowing respondents to amend their answers is not worthy of certiorari. In any event, the Second Circuit correctly held that there was no such abuse of discretion.

Further, the Second Circuit's application of the doctrine of res judicata does not conflict with this Court's decisions or those of other Circuits. Moreover, while petitioners claim that the agreement settling the prior action "with prejudice" was not an adjudication on the merits, that argument is unpreserved because it was not raised in the Second Circuit. In any event, the District Court correctly held that the court-approved settlement agreement constituted an adjudication on the merits.

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[1] Numbers in parentheses preceded by the letter "A" refer to the pages of the Joint Appendix in the Circuit.

Directive 2262 of the Department of Correction's Sick Leave Policy Prior to 1996

The Correction Officers' Benevolent Association ("COBA"), the exclusive bargaining agent for New York City correction officers (A1117 §1), has successfully bargained and secured for its members a generous benefits package which includes the "unlimited" sick leave policy at issue here. First implemented in 1987, DOC Directive 2262 generally permits a correction officer to report in sick for periods of up to one year provided he or she stays at home except for authorized medical departures (A746, A752-53). In 1988, the policy was amended to permit certain officers taking sick leave to be 24 hours out-of-residence so long as certain reporting requirements were fulfilled (A746-65, A2074-75 ¶6). Those officers ineligible for the full-day permit were granted a four hour "recreation" period (known as "rec" hours) to attend to their personal needs and were relieved of the obligation to log in and out when leaving home (*Id.*).

By 1993, DOC officials suspected that the liberalized sick leave policy was being widely abused. An audit found that much of the documentation submitted by officers for their authorized departures did not substantiate their participation in the reported activity (A2075-77 ¶9-12, A2083-99). The audit team recommended that officers on sick leave be limited to their four "rec" hours for all personal activities and that additional hours out-of-residence not be granted (A2076 ¶11, A2098 §IV). When Terrence Skinner became commanding officer of DOC's Health Management Division ("HMD") in 1995, he implemented many of the auditors' recommendations, by tightening up enforcement of Directive 2262 and limiting 24 hour out-of-residence privileges to officers injured in the line of duty (A827-28, A835-36, A767-68, A2077 ¶13, A2100-02, A2078 ¶14). The new enforcement mechanisms

reduced daily sick rates by 35-40 percent and allowed DOC to more evenly distribute the work load across the uniformed work force (A2079-80 ¶¶17, 18, 24).

The Lawsuit by the President of the Correction Officers Benevolent Association

In 1995, Norman Seabrook, President of COBA, along with two individual correction officers, filed a civil suit in the United States District Court for the Eastern District of New York, challenging the constitutionality of Directive 2262's home confinement provisions (the "*Seabrook* Action") (A1169-76). The complaint, brought by Seabrook "in his capacity as President of the Correction Officers' Benevolent Association" sought both damages and equitable relief on behalf of the "Correction Officers' Benevolent Association, the collective bargaining agent for the 10,000 correction officers employed by the defendant Department of Correction" (A1169 ¶1, A1172 ¶12, A1174-76 ¶¶1-5).

On April 9, 1996, the *Seabrook* Action settled, resulting in a "Stipulation and Order of Settlement and Discontinuance," approved by the District Court (A1177-78). The stipulation recited that the action had been commenced by Seabrook "in his capacity as President of the Correction Officers' Benevolent Association," and provided that it resolved the claims that "Section VII of the defendants' sick leave policy, Directive 2262, is unconstitutional on its face and as applied, and violated [the plaintiffs'] constitutional rights and the rights of similarly situated sick employees in violation of 42 U.S.C. § 1983" (A1177). The stipulation further provided that these claims were "dismissed, with prejudice" and that "[w]ithin five days of the Court's signing of this order, the defendants agree to amend Section VII of Directive 2262, in the form as annexed hereto." Notice of any further changes in the

sick leave policy were to be provided not to Seabrook personally, but to COBA (A1177-78).

The Present Sick Leave Policy

Pursuant to the parties' agreement, Directive 2262 was amended effective April 22, 1996. The Directive now provides that, unless correction officers are classified as "sick leave abusers," they will not be confined to their residence for the first eight days of leave (A1179, A1090-91). Beyond this initial grace period, the leave policy differentiates between officers injured in the line of duty and those who are "otherwise out on sick leave." Officers who report sick as the result of a verified line-of-duty injury and who have a definite return-to-duty date within two weeks of the date they visit an HMD physician are not confined to their residences (A1179 ¶2, A1091 ¶J). An officer injured in the line of duty without a definite return date is subject to home confinement, but may apply to HMD for additional time out-of-residence so long as the officer has a sick leave history of 8 days or less per year for 3 years, has not been classified as a "sick leave abuser," has a violation-free sick leave history, and can document an objective finding of injury or illness (A1179, A1091 ¶K, A2109, A2080 ¶20).

Officers otherwise out on sick leave are required to remain in their residences except for their four "rec" hours or when they log out for medical appointments, hospital visits or physical therapy ordered by a physician (A1179, A1091 ¶F). All personal business must be conducted during the four "rec" hours -- either the block of time from 8:00 a.m. – 12:00 p.m. or from 1:00 p.m. – 5:00 p.m. (*Id.*) HMD will only entertain individual requests for additional time out-of-residence "in the event of dire emergency" and each such request is evaluated by the Commanding Officer or his designee on a case-by-case basis (*Id.*).

This Action

Petitioners, forty current or former correction officers who belonged at all relevant times to COBA, filed these twelve consolidated actions in 1996 and 1997. Petitioners claimed that the home confinement provision of Directive 2262 was unconstitutional on its face and as applied to them.

Both petitioners and respondents sought summary judgment. Petitioners sought summary judgment with respect to their claim that the home confinement provision was facially unconstitutional (A703).

Respondent sought summary judgment, *inter alia*, on the ground that all of petitioners' claims were barred by res judicata, in light of the court-approved stipulation in the *Seabrook* Action, which involved an identical challenge to the constitutionality of the home confinement provisions of the sick leave policy. Respondents asserted the res judicata defense in two answers, which covered thirty of the forty petitioners (*see* 12a-13a). Those two answers, while untimely, were filed with petitioners' consent, which was given in a telephone conference with the District Court and was not conditioned on the waiver of any defenses (*Id.*). It is undisputed that petitioners' counsel was well aware of the *Seabrook* stipulation, at least one year before respondents' motion for summary judgment was filed (14a & n.4).

District Court Decision

By opinion and order (one paper) dated July 7, 1998, the District Court granted respondents' motion for summary judgment and denied petitioners' motion for summary judgment (38a-51a). Finding that petitioners sought a "third bite at the proverbial apple" given that the sick leave policy challenged in the *Seabrook* Action was itself the result of collective bargaining, the Court held that petitioners "may no longer feed on this fruit, since . . . their

claims are not only barred by principles of res judicata, but also are both legally and factually deficient" (40a).

The District Court allowed respondents to assert the res judicata defense in the ten actions where they had failed to affirmatively plead the defense, because petitioners had failed to demonstrate "material prejudice" (41a). In this regard, the Court held that " 'the time, effort and money . . . expended in litigating' a matter" did not constitute such prejudice and that, in any event, the only discovery taken by petitioners in all twelve cases consisted of deposing two witnesses (*Id.*) Additionally, the Court found that, even if petitioners' claims of prejudice were "more colorable than they in fact are, on no analysis are they sufficiently substantial to overcome the 'strong public policy in economizing the use of judicial resources' that, in appropriate cases, even warrants a court in raising the defense of res judicata *sua sponte*" (*Id.*)

The District Court then held that res judicata fully disposed of petitioners' facial challenge to the constitutionality of the sick leave policy, because: (1) the voluntary dismissal with prejudice of the claims in the *Seabrook* Action constituted an adjudication on the merits; (2) petitioners were in privity "as a formal matter, as a practical matter, and as a matter of the identity of interests" with Norman Seabrook who brought the *Seabrook* Action in his capacity as president of COBA -- the union that represented all of the petitioners; and (3) petitioners' constitutional claims were, or could have been, raised in the *Seabrook* Action (41a-43a). The Court also found that most of petitioners' "as applied claims" were barred by res judicata, because they were "either sufficiently general or sufficiently inherent in a neutral application" of the

amended sick leave policy that they were, or reasonably could have been, raised in the COBA Action (48a).[2]

Court of Appeals Decision

By opinion entered June 8, 2000, the Court of Appeals for the Second Circuit unanimously affirmed. The Court held that the District Court had not abused its discretion in allowing respondents to amend their answers to assert the res judicata defense (11a-14a). The Court found that petitioners were not unduly prejudiced by the District Court's decision, because assertion of the defense: (1) would not require petitioners to expend significant additional resources to conduct discovery and prepare for trial; (2) would not significantly delay the resolution of the dispute; and (3) would not prevent petitioners from bringing a timely action in another jurisdiction (13a). The Court emphasized that respondents' amendment did not impede the fair prosecution of petitioners' claims and did not unfairly surprise petitioners, as petitioners' counsel was well aware of the *Seabrook* stipulation at least one year before respondents moved for summary judgment (14a).

Further, the Court of Appeals held that, pursuant to the doctrine of res judicata, the *Seabrook* stipulation barred petitioners' facial challenge to Directive 2262 (15a-29a). The Court noted at the outset that petitioners were no

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[2] The District Court then also held that "separately and independently," the sick leave policy was constitutional on its face (43a-47a). Additionally, as to the remaining as applied claims, such as alleged harassment, wrongful punishment or disparate application of the sick leave policy, that were not barred by res judicata, the Court held that petitioners "ha[d] utterly failed to meet their burden to set forth admissible evidence supporting these claims or otherwise demonstrating that a genuine issue of material fact exist[ed] for trial" (48a-50a).

longer contesting that the settlement agreement was a final judgment on the merits (16a).

The Court of Appeals found, in relevant part, that petitioners were in privity with Norman Seabrook, because he had brought the earlier action in " 'his capacity as President of the Correction Officers' Benevolent Association' in an effort to protect the rights of COBA members subject to Directive 2262" (17a, 22a-23a). The Court also explained that each petitioner belonged at all relevant times to COBA, the " 'sole and exclusive collective bargaining representative for the unit consisting of employees of New York City in the titles of Correction Officer. . . .' " (17a [quoting the collective bargaining agreement]). Hence, the Court ruled that petitioners' interests were adequately represented in the *Seabrook* Action (16a-17a, 24a).

The Court of Appeals also held that the plain language of the *Seabrook* stipulation, which had dismissed the action "with prejudice," indicated the parties' desire for finality (24a). Further, the Court held that there was a sufficient identity of claims between petitioners' action and the *Seabrook* Action for purposes of res judicata (25a-29a).

Having concluded that res judicata barred petitioners' facial challenge to the sick leave policy, the Court did not review the District Court's alternative holding that Directive 2262 was constitutional (29a n.7).[3]

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[3] The Court of Appeals also held that the District Court appropriately dismissed all of the "as applied" claims (26a-36a). The Court explained that petitioners' assertion of new incidents arising from the application of the sick leave policy was insufficient to bar the application of res judicata, because most of these incidents fell "within the same queue as those of injured officers who sought additional time out-of-residence under the earlier version" of the sick leave policy, and the " 'as applied'

REASONS FOR DENYING THE PETITION

I.

THE SECOND CIRCUIT'S APPLICATION OF THE DOCTRINE OF RES JUDICATA DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR THOSE OF OTHER CIRCUITS.

Contrary to petitioners' claim (Pet. Pt. I, pp. 4-5), the Second Circuit's application of the doctrine of res judicata does not conflict with this Court's rulings or those of other Circuits.

The Second Circuit explained in this case that, in order to prove the affirmative defense of res judicata, a party must show that: (1) the previous action involved an adjudication on the merits; (2) the previous action involved the same plaintiffs or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been raised in the prior action (15a *citing Allen v. McCurry,* 449 U.S. 90, 94 [1980]). This is the exact same test employed by this Court. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (also noting that "[t]here is little to be added to the doctrine of

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label cannot obscure the fact that new time out-of-residence denials are part of the same series of transactions" (26a-27a, 34a-35a). As to the remaining as applied claims, which included claims of harassment and wrongful punishment (32a-36a), the Court noted that petitioners did not specifically address the material elements of any of these claims and had not appealed the grant of summary judgment as to these claims (31a-32a, 35a-36a).

res judicata as developed in the case law of this Court"); *Allen v. McCurry*, 449 U.S. at 94.

While petitioners claim that the Second Circuit's application of res judicata does not include other Circuits' additional requirement that the plaintiffs have had a full and fair opportunity to litigate their claims (Pet. Pt. I at 4), the Second Circuit's application of res judicata does, in fact, incorporate due process concerns. Therefore, the Second Circuit's application of res judicata does not conflict with other Circuits' decisions.[4]

For example, in discussing the privity element of res judicata, in *Chase Manhattan Bank, N.A. v. Celotex Corp.*, the Second Circuit emphasized that the key to the privity determination is whether the interests of the non-party have been adequately represented by others who have previously litigated the matter and lost. 56 F.3d 343, 345 (2d Cir. 1995). The Court explained that absent an identity of incentives between the earlier party and the party against whom res judicata is asserted, the application of res judicata would violate concepts of elemental justice and probably due process. *Id.* at 346. The Court then held that res judicata did not apply in that case, precisely because the two parties did not have an identity of incentives and, hence, were not in privity. *Id.* at 346-47.

Similarly in this case, the privity analysis employed by the Second Circuit and the District Court incorporated due process concerns. In determining that petitioners were in privity with the plaintiff in the *Seabrook* Action, both

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[4] Some of the cases cited by petitioners involve collateral estoppel, not res judicata. *See, The Virginia Hospital Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1501 & n. 1 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985).

Courts relied on the fact that petitioners' interests had been adequately represented by Norman Seabrook. As explained by the Second Circuit:

> It is clear that Norman Seabrook brought the earlier action in "his capacity as President of the Correction Officers' Benevolent Association" in an effort to protect the rights of COBA members subject to Directive 2262. Each plaintiff here belonged at all relevant times to COBA, the "sole and exclusive collective bargaining representative for the unit consisting of employees of New York City in the titles of Correction Officer . . ."

(17a [quoting the settlement agreement in the *Seabrook* Action and the collective bargaining agreement]). The Second Circuit also noted that Norman Seabrook was freely chosen to be the authorized bargaining representative for COBA members and that he had brought the prior action for the benefit of the union members (22a-23a).

The District Court in this case similarly concluded that petitioners were adequately represented in the *Seabrook* action (42a):

> Privity is established because the plaintiff in the *Seabrook* case brought that action "in his capacity as President" of the union that represented all of the instant plaintiffs in connection with the very issues here raised: he and they were thus in privity as a formal matter, as a practical matter, and as a matter of the identity of interests between those involved in *Seabrook* and those involved in the instant actions.

Thus, these decisions demonstrate that due process concerns are inherent in the privity analysis employed in the Second Circuit.

Further, in applying the third element of res judicata -- that the claims asserted in the subsequent action were, or could have been raised in the prior action -- the Second Circuit has also incorporated due process concerns. For example, in *Burgos v. Hopkins*, 14 F.3d 787, 790-92 (2d Cir. 1994), the Second Circuit held that res judicata did not bar the plaintiff's action pursuant to 42 U.S.C. section 1983, because the state court which had decided the plaintiff's prior petition for habeas corpus was not empowered to award him damages.

Accord Owens v. New York City Housing Authority, 934 F.2d 405, 410 (2d Cir.), *cert. denied*, 502 U.S. 964 (1991) (holding that the plaintiff's claims were not barred by res judicata, because the state court in the earlier proceeding was not empowered to address her retaliation and discrimination claims); *Alpert's Newspaper Delivery v. New York Times Co.*, 876 F.2d 266, 271 (2d Cir. 1989) (holding that the abuse of monopoly claim was previously too narrowly raised and insufficiently litigated for it to be barred).

In short, the Second Circuit's application of res judicata does not conflict with this Court's or other Circuits' rulings, since it incorporates due process concerns. Therefore, contrary to their claim (Pet. Pt. IB at 6-7), petitioners were not prejudiced in any way by the Second Circuit's application of res judicata.

II.

PETITIONERS' CLAIM THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOWING AMENDMENT OF THE PLEADINGS PURSUANT TO FED. R. CIV. P. 15(a) IS NOT WORTHY OF CERTIORARI. IN ANY EVENT, THE SECOND CIRCUIT CORRECTLY HELD THAT THE THERE WAS NO ABUSE OF DISCRETION.

Petitioners' claim, that the District Court abused its discretion in allowing respondents to amend their pleadings, is not worthy of certiorari. Petitioner has not identified any conflict between the Second Circuit's interpretation of Fed. R. Civ. P. 15(a), which governs amendment of pleadings, and the interpretation of that Rule by this Court or other Circuits. Indeed, as acknowledged by petitioners (Pet. Pt. II at p.8), the standards regarding amendment of pleadings are well settled.

In *Foman v. Davis*, 371 U.S. 178, 182 (1962), which was cited by the Second Circuit in this case (12a), this Court explained that, pursuant to Rule 15(a), leave to amend shall be " 'freely given,' " absent reasons such as undue delay, bad faith, or undue prejudice to the opposing party. This Court further emphasized that the grant or denial of an opportunity to amend is within the discretion of the District Court. *Id.*

Consequently, petitioners' claim involves only the application of facts to a well-settled standard. Such a claim does not merit this Court's review. *See NLRB v. Hendricks Co.*, 454 U.S. 170, 176 n.8 (1981) (dismissing a writ of certiorari as improvidently granted, because it primarily

presented "a question of fact, which does not merit Court review"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, the District Court did not abuse its discretion in allowing respondents to assert the defense of res judicata. At the outset, and contrary to petitioners' claim (Pet. Pt. II at p. 8), it is important to emphasize that the District Court's decision to allow respondents to assert the res judicata defense only involved ten of the forty petitioners. Respondents asserted the res judicata defense in two of the twelve answers, covering thirty of the forty petitioners. The answers, while filed late, were filed with petitioners' consent, which was not conditioned on respondents' waiver of the assertion of any defenses. *See* 12a-3a, 40a & n.2.

As to the remaining petitioners, the Second Circuit correctly held that the District Court did not abuse its discretion in allowing the amendment, because petitioners failed to demonstrate that they were prejudiced. The crux of petitioners' argument was that respondents' delay caused them to waste time and money deposing witnesses and preparing for a trial on the merits (13a). However, as explained by both the District Court and the Second Circuit, the fact that one party has spent time and money preparing for trial will usually not be deemed prejudice sufficient to warrant a deviation from the rule broadly allowing amendment to the pleadings (*see* 14a, 40a-41a). In any event, as recognized by the District Court (41a), petitioners deposed only two individuals. The remaining depositions were taken by respondents.

Moreover, as emphasized by the Second Circuit (14a), petitioners were well aware of the prior stipulation in the *Seabrook* Action at least one year before respondents' motion for summary judgment was filed. Consequently,

respondents' amendment and assertion of the res judicata defense did not unfairly surprise petitioners.

While petitioners claim that they were prejudiced on the ground that they were unable to conduct any discovery relating to the res judicata defense and that they might have sued COBA for failing to properly represent them, these arguments were not raised in the District Court and hence, are not properly preserved for this Court. At any rate, petitioners did not seek the opportunity in the District Court to conduct additional discovery, in light of the res judicata defense.

Additionally, while petitioners now also claim that petitioners Irwin Cohen and Julie Knowles are not members of COBA (Pet. Pt. II at 10), that claim was also never asserted in either the District Court or in the Court of Appeals, and, hence, is similarly unpreserved.

In short, petitioners' argument is not worthy of certiorari and, in any event, is without merit.

III.

PETITIONERS' CLAIM THAT THE SETTLEMENT AGREEMENT WAS NOT AN ADJUDICATION ON THE MERITS IS UNPRESERVED, BECAUSE IT WAS NOT RAISED IN THE SECOND CIRCUIT. IN ANY EVENT, THE DISTRICT COURT'S HOLDING WAS CORRECT.

Petitioners now claim that the settlement agreement was not an adjudication on the merits (Pet. Pt. III at pp.11-13).[5] That claim, however, is unpreserved.

In the Second Circuit, petitioners did not contest that the settlement agreement in the *Seabrook* Action was an adjudication on the merits. In fact, the Second Circuit explicitly noted: "On appeal, plaintiffs no longer contest that the settlement agreement is a final judgment on the merits" (16a).

Therefore, that issue is not properly before this Court. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) (declining to address an issue, because the question was not raised in the Court of Appeals); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (same).

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[5] Petitioners' Point III appears to have confusingly conflated two separate elements of res judicata: (1) the requirement that the previous action involved an adjudication on the merits; and (2) the requirement that the previous action involved petitioners or those in privity with them. However, as petitioners have failed to explicitly address the privity element, and as petitioners' main focus appears to be on the adjudication on the merits issue -- as evidenced by their point heading and question presented -- respondents will also only address that issue.

In any event, this Court has previously held that consent judgments have preclusive effect -- indicating that they do constitute adjudications on the merits. *See, e.g., United States v. Southern Ute Tribe*, 402 U.S. 159 (1971) (holding that the respondent's claims for compensation and accounting were barred by res judicata, where they were the subject of a final settlement reduced to a consent judgment); *United States v. International Building Co.*, 345 U.S. 502, 506 (1953) (explaining that a judgment premised on a stipulation between the parties was "[c]ertainly . . . res judicata of the . . . claims" encompassed by the settlement agreement). Thus, the District Court's holding, that the voluntary dismissal of the prior action "with prejudice" constituted an adjudication on the merits, was correct.

In short, aside from being unpreserved, petitioners' argument, that the settlement agreement's "with prejudice" dismissal was not an adjudication on the merits, is without merit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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